IN RE BLACKEYE AGAIN TIMBER SALE

IBLA 85-511 Decided June 15 1987

Appeal from decision of District Manager, Medford District Office, Oregon, Bureau of Land Management, denying protest of proposed timber sale OR-110-TS5-17.

1. Timber Sales and Disposals

A BLM decision to proceed with a proposed timber sale will not be disturbed on appeal where the appellant has not established that BLM failed to consider relevant matters of environmental concern, such as the impact on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

APPEARANCES: Christopher Bratt, president, Headwaters, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Headwaters, Inc. has appealed from a decision of the District Manager, Medford District Office, Oregon, Bureau of Land Management (BLM), dated February 27, 1985, denying its protest of the Blackeye Again timber sale, OR-110-TS5-17, involving tract No. JA-2. BLM originally offered the tract, containing 343 acres of land and 3.506 MMBF (million board feet) of timber, in the Blackeye timber sale on March 3, 1982. The contractor who purchased the contract was unable to complete it. The remaining timber on the tract was offered for sale on February 28, 1985, as the Blackeye Again timber sale. The Blackeye Again timber sale allows removal of 2.575 MMBF of timber from 329 acres of land by means of overstory removal (294 acres) and clearcutting (35 acres).

On February 14, 1985, appellant filed a protest in part to the proposed Blackeye Again timber sale, contending that the sale, together with three other timber sales (Demstrong, Centennial Ridge, and Trappers Trap), would exceed clearcutting limits established in the Jackson-Klamath and Josephine Sustained Yield Unit Final Timber Management Environmental Impact Statements (EIS) for the 10-year period from 1979-1989, in the absence of preparation of a supplemental EIS, and violate the "Church Guidelines" on clearcutting and the principle of sustained yield. Finally, appellant contended that the

environmental assessment (EA) prepared in connection with the original timber sale was inadequate and that the original finding of no significant impact (FONSI) was in error. Appellant requested a stay in the awarding of the timber sale contract.

In its February 1985 decision, BLM denied appellant's protest, stating that clearcutting would not exceed the "total initial entry clearcut acreage stated in the Jackson-Klamath EIS" and that the EA and FONSI pertaining to the original timber sale "remain applicable." BLM stated that it would proceed to award the timber sale contract pursuant to 43 CFR 5003.3(f), in the absence of a "compelling reason to delay or stop * * * the award." In its notice of appeal, filed April 2, 1985, appellant again requested a stay in the awarding of the timber sale contract. Appellant filed a statement of reasons for its appeal on April 29, 1985, which is a copy of its February 1985 protest.

The Blackeye Again timber sale took place on February 28, 1985, with Jantzer and Sons Logging, Inc. (Jantzer) being declared the high bidder. By letter dated March 8, 1985, BLM informed Jantzer that its bid was accepted and that BLM was proceeding to award the timber sale contract pursuant to 43 CFR 5003.3(f), but that Headwaters had a right to appeal BLM's February 1985 decision denying its protest and to request a stay of implementation of that decision. The timber sale contract was executed by BLM on April 1, 1985, effective March 8, 1985.

By order dated January 30, 1986, this Board denied appellant's request for a stay. We also noted that the issue of the environmental impact of clearcutting in excess of the limits set forth in the Jackson-Klamath and Josephine Sustained Yield Unit Final Timber Management EIS's had been rendered "moot" by virtue of preparation of a supplemental EIS (SEIS), dated May 1985, which addressed this issue. Finally, we afforded appellant an opportunity to submit a supplemental statement of reasons. A supplemental statement was filed on March 10, 1986.

We will address each of the relevant concerns raised by appellant with respect to the Blackeye Again timber sale. These concerns focus on the adequacy of the EA, prepared May 1982 and amended December 1982, for the original timber sale. In its supplemental statement of reasons, appellant does not pursue the issue of excessive clearcutting or three other issues raised in its original statement of reasons, viz., clearcutting of low intensity management lands, removal of the original "stand basal area" and preparation of BLM's management framework plan. Each of these issues was already addressed in the Board's January 1986 order herein. In addition, appellant has raised other issues that are outside the scope of the present appeal, viz., the adequacy of the SEIS, the propriety of a November 12, 1985, decision of the Director, BLM, and BLM's overall timber management program in the Medford District, including the extent of the "allowable cut," given such factors as the availability of herbicides for vegetative management, the structure of the timber industry, the rate of return from timber sales and BLM funding. Appellant has also challenged the FONSI, dated March 28, 1983, in which the Area Manager, Jacksonville Resource Area, BLM, concluded that the sale would have "no significant impact" beyond that previously analyzed in the Jackson-Klamath Sustained Yield Unit Final Timber Management EIS. As noted above,

the District Manager in his February 1985 decision denying appellant's protest concluded that the EA and FONSI both remain applicable "for the Blackeye Again sale."

[1] A determination that a proposed action will not have a significant impact on the quality of the human environment, based on an EA, will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable in light of the environmental analysis. 1/ Glacier-Two Medicine Alliance, 88 IBLA 133 (1985). The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Id. The burden of proof is on that party. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 747 (3rd Cir. 1982).

Appellant contends first that the EA failed to consider connected, cumulative, and similar actions as required by 40 CFR 1508.25. Appellant points out that, although the Blackeye Again timber sale involves "previously -- harvested lands," BLM failed to adequately assess cumulative environmental impacts, as well as a monitoring report based on an August 27, 1980, evaluation of an earlier Blackeye timber sale.

The EA contains a discussion of site-specific environmental impacts of the Blackeye timber sale, stating that the nature of the analysis was "limited to that needed to determine whether there are significant environmental effects." EA at 8. There is no discussion in the EA of any cumulative impacts associated with prior harvesting of the timber sale area. There is also no mention of the August 1980 monitoring report, which appellant submits on appeal. It is well recognized that a Federal agency must assess the cumulative impact of several related actions where those actions would individually have an insignificant but collectively a significant environmental impact. Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). However, appellant has presented no evidence that prior harvesting had a significant cumulative impact which the EA failed to address. 2/ Moreover, appellant has

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1/ A finding that a proposed action is a major Federal action which would have a significant impact on the quality of the human environment would require preparation of an EIS prior to undertaking the proposed action, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1982). See Como-Falcon Coalition, Inc. v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd on other grounds, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980).

2/ The monitoring report to which appellant refers relates to a timber sale prior to August 27, 1980, over 2 years before the original Blackeye timber sale assessed in the EA. The report indicates that certain mitigating measures were not properly taken but that generally, except for "ripping," the mitigating measures used were "effective." We note that ripping would only occur in one 15-acre unit (Unit 14) under the Blackeye Again timber sale. The monitoring report also states that, due to a fire, "logging activities

not established that the District Manager, in proceeding with the Blackeye Again timber sale, overlooked any significant cumulative impacts which would result from the harvesting of the remaining timber. Finally, appellant has presented no evidence of a significant cumulative impact which would result from the Blackeye Again timber sale in conjunction with any other related past, present, or reasonably anticipated timbersale or other permitted activity.

Appellant argues that BLM is relying on "unrealistic projections of the effectiveness and reliability of 'project design features' and mitigation measures." Again, appellant has presented no evidence that these measures, designed to mitigate environmental impacts to insignificant levels, are either ineffective or unreliable. We must discount this objection. See In re Upper Floras Timber Sale, 86 IBLA 296 (1985).

Appellant argues that BLM has failed to consider alternatives to the proposed timber sale other than the no action alternative, in violation of 40 CFR 1501.2(c). Appellant suggests overstory removal "that is not a virtual clearcut," selective cutting, no timber harvesting and "all-species" or "uneven-aged" management as other alternatives.

An EA is only required to include a "brief" discussion of "alternatives" as required by section 102(2)(E) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(E) (1982). 40 CFR 1508.9(b). Section 102(2)(E) of NEPA, requires a Federal agency to describe "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." The record includes a description of "appropriate alternatives." Appellant has overlooked the fact that alternatives were discussed in the Jackson-Klamath Sustained Yield Unit Final Timber Management EIS, which was incorporated by reference in the EA. See Ventling v. Bergland, 479 F. Supp. 174, 181 (D.S. Dakota 1979), aff'd, 615 F.2d 1365 (8th Cir. 1979); In re Upper Floras Timber, Sale, supra at 311. In addition, as the EA discussed the environmental impacts of the timber sale in some detail, it was not necessary for BLM to discuss the myriad of alternatives which could be devised, each resulting in an incremental change in the overall impact of the sale. It is sufficient that BLM set forth the many implications of either its proposed action or the no action alternative, which are at either end of the spectrum.

The purpose of an exposition of alternatives, with their associated environmental impacts, is, after all, to provide the decisionmaker with the basis for an informed choice as to whether to proceed with the proposed action or to take some other course of action. Calvert Cliffs' Coordinating Committee, Inc. v. United States Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Callaway, 389 F. Supp. 1263, 1281 (D. Conn. 1974), rev'd in part on other grounds, 524 F.2d 79 (2d Cir. 1975). While neither the EA nor the EIS involved herein expressly considered all of those alternatives suggested by appellant, we

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fn. 2 (continued)
could significantly increase erosion," and that the sale resulted in "[s]ame loss of soil productivity due to soil compaction from tractor yarding." The relevance of this report to this timber sale has not been established.

cannot say that the nature and consequences of lesser courses of action were not inherent in the discussion of the proposed action. This was sufficient. See Kettle Range Conservation Group v. Berglund, 480 F. Supp. 1199, 1203 (E. D. Wash. 1979). This approach, at least in the context of an EA, is consistent with the "rule of reason" which is "implicit in this aspect of the law." Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972); see generally, Sierra Club v. Froehlke, 359 F. Supp. 1289 (S. D. Texas 1973), rev'd on other grounds and remanded, 499 F.2d 982 (5th Cir. 1974).

Appellant also argues that BLM failed to adequately address certain site-specific environmental impacts of the timber sale, i.e., the impacts on soil, water, fisheries, and wildlife. 3/ The record belies this assertion. The EA, at pages 10-11, discusses the environmental impacts of the timber sale on these natural resources. In addition, in the March 1983 FONSI, the Area Manager decided to implement the proposed action "as identified" in the EA, i.e., including the project design features and other mitigating measures set forth in the EA. Those measures were designed in part to minimize the impact to soil, water, fisheries, and wildlife. 4/ See EA at 4-5, 12-13. Appellant has simply presented no evidence that significant adverse impacts with respect to these natural resources were overlooked or that the mitigating measures to be implemented will not reduce any impacts to insignificant levels. 5/

3/ Appellant also states that BLM has improperly deferred consideration of the environmental impact of herbicide use in vegetative management to future EA's despite the fact that it is "built in" to BLM's timber sale program. We note that the EA states at page 8 that "[i]mpacts from herbicide treatments on units sold in a timber sale * * * will be analyzed in future annual vegetative management program environmental assessments." However, we can find no reference to site preparation following harvesting by means of chemical treatment in the "Sale Layout Summary" for the timber sale. In any case, there has yet been no irreversible commitment to use herbicides. See Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 92 I.D. 37 (1985).

4/ Appellant states, however, that the December 1982 addendum to the EA removed "important" mitigating measures designed to protect "fragile and unstable" soils, specifically that BLM will not require one-end long suspension on clearcut units and the planting of noncompetitive cover on bare soil and that tractor yarding can take place on designated skid trails even when soil moistures exceed 25 percent. However, appellant has presented no evidence that elimination or modification of these measures will result in significant adverse environmental impacts. Appellant has also presented no evidence that the timber sale "will lower water quality and deteriorate aquatic habitat." Appellant also erroneously states that spotted owls "occupy" the timber sale area. See Addendum to EA, at 1. Finally, appellant does not specify the nature of any problem with "snag retention" or support its contention that there are unaddressed "regeneration problems."

5/ Appellant also argues that BLM failed to consider the cost of "[p]ost-harvest management." It is unclear whether appellant is referring to the cost to the purchaser of rehabilitation or the cost to BLM of monitoring such rehabilitation. However, appellant has offered no evidence that the purported lack of financial resources would in any way affect the environmental impact of the timber sale, which impact is the subject of an EA.

Appellant argues that the timber sale will "exceed VRM [Visual Resource Management] IV Guidelines." This is at variance with the statement in the EA, at page 11, that the "visual contrast rating does not exceed the maximum for the visual class zone in the timber sale area." The EA states that VRM Class IV provides that "management activities may be visually apparent to the casual observer and may also become dominant in the landscape." Id. Appellant has presented no evidence in support of its position. See In re Upper Floras Timber Sale, supra at 306; In re Lick Gulch Timber Sale, 72 IBLA 261, 302-303, 90 I.D. 189, 212-13 (1983).

Finally, appellant contends that the timber sale will violate the "Church Guidelines" on clearcutting and the principle of sustained yield under section 1 of the Act of August 28, 1937, 43 U.S.C. § 1181a (1982). No evidence is offered in support of these charges. We, therefore, can give them no credence. See SEIS, at 84-88; In re Upper Floras Timber Sale, supra at 301-308.

Overall, appellant has offered only unsubstantiated, broadside challenges to the Blackeye Again timber sale. We conclude that the record establishes that BLM identified and considered all relevant matters of environmental concern and that the decision to proceed with the timber sale was premised on neither a clear error of law nor a demonstrable error of fact. Accordingly, we hold that BLM properly denied appellant's protest. See In re Upper Floras Timber Sale, supra; In re Lick Gulch Timber Sale, supra; cf. In re Humpy Mountain Timber Sale, 88 IBLA 7 (1985)

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

R. W. Mullen
Administrative Judge.